UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

SECURITAS SECURITY SERVICES

Respondent, **Cases 16-CA-176006**
and **16-CA-183494**

RYAN PATRICK MURPHY

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO THE REOPENING OF THE RECORD AND REQUEST THAT CERTAIN ALLEGATIONS BE SEVERED AND REMANDED TO THE REGIONAL DIRECTOR FOR DISPOSITION

Relying upon *Lutheran Heritage*, 343 NLRB 646, 646 (2004), Your Honor found that Respondent violated Section 8(a)(1) of the Act by maintaining numerous rules in this case. Thereafter, the Board overturned *Lutheran Heritage* and set forth a new test for rules allegations in *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017). The Board subsequently remanded the case to Your Honor, who, in turn, asked the parties to take positions as to the need for the reopening of the record and for their positions as to the lawfulness of the rules under the standard announced in *Boeing*.

Counsel for the General Counsel's position as to the re-opening of the record, is that such re-opening is unnecessary. Further, Counsel for the General Counsel now takes the position that the no-recording, the no-photography, and the no-gossip rules are lawful under *Boeing* and requests that these allegations be severed and remanded to the Region for disposition. As to the remaining allegation, which involves Respondent's orally promulgated rule barring discussions about the subject of an investigation, Counsel for the General Counsel continues to take the position that the rule is unlawful under the standard announced in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015).

I. STATEMENT OF THE FACTS

In discussing the facts, this brief will describe Respondent's corporate structure and operations and Respondent's directive to the Charging Party not to discuss internal investigations.

A. Respondent's Operations

Respondent is the second largest security services provider in the nation. Respondent offers its clients a full range of security services at a local, national, and international level. These services include the provision of security officers at client facilities, the provision of mobile security services, the sale and maintenance of technology products such as cameras and key card access, and the provision of investigative and risk management consultations (Tr. 59-60, LL. 20-3).

Respondent maintains two Austin area contracts with Samsung, the Samsung Austin Research Center and the Samsung Austin Semiconductor Plant, where Respondent provides security guards (Tr. 26, LL. 4-5 and 19-23). Respondent employs about 110 employees at these locations combined (Tr. 26, LL. 9-17, Tr. 26-27, LL. 24-1). Branch Manager Joe Shuler manages Respondent's operations in the Austin area (Tr. 27, LL. 16-18). Guards employed at the Samsung facilities receive work emails through Samsung accounts (Tr. 32, LL. 9-11). Respondent regularly communicates with its employees via their Samsung email accounts (Tr. 32, LL. 4-5).

Respondent employs at least ten guards who work at the Research Center (Tr. 26, LL. 9-17). Guards at the Research Center work in shifts of about three, with two guards and a shift supervisor working together (Tr. 27, LL. 2-10). The relevant facts of this case relate to actions that occurred at the Research Center.

B. Respondent Prohibits Employee from Discussing Internal Investigations

On April 26, 2016, employee David Brown filed a complaint for race discrimination and Respondent began an investigation into the complaint (Tr. 30, LL. 13-22; Tr. 122-123).[1] Charging Party Ryan Murphy was the only other employee present during the incident (Tr. 27, LL. 5-7). Although Respondent contends that this incident concerned a discrimination complaint, Murphy testified that he was never made aware that there was a discrimination complaint made (Tr. 45, LL. 2-8). Following the initial investigation of the incident, on May 5, 2016 as Murphy's shift ended, he was interviewed by Branch Manager Joe Shuler and Human Resources Manager Tennille Gray regarding the incident (Tr. 31, LL. 1-5). Murphy testified that following the interview, Shuler and Gray instructed him not to discuss the investigation of the incident with any of his co-workers and also requested that he email them a written statement of his knowledge of the incident (Tr. 31-32).

On May 6, 2016, Murphy emailed Gray his written statement regarding the April 26, 2016 incident. In his email, Murphy requested clarification on the prohibition of discussing the investigation asking specifically:

> First, are you barring me and any other officer who is assigned to [the Research Center] from discussing this matter in perpetuity? Is it just while you are investigating it? Are there specific individuals with whom this bar is attached or is it a blanket prohibition among every security officer? Does the prohibition to talk just include this incident or does it include other work related matters? What is the intent of the prohibition? Does the prohibition only apply during work hours and on site, or am I, and every other officer prohibited from speaking about this incident amongst ourselves regardless of the setting? Lastly, what are the possible ramifications that I or any other office may face if we fail to adhere to this prohibition?
>
> If I don't receive a response, I'll assume that the prohibition to not talk about this incident applies to myself and every officer assigned to [the Research Center]

[1] At Respondent's request, little evidence was presented about the nature of the racial discrimination claim or the underlying incident. [Tr. 28, LL. 15-23]

> regardless of timing or setting. If this prohibition was in fact [erroneous] it is my hope that I, along with every officer on site…receives education on this matter. (Tr. 33-34; GC Exh. 2, at 3). Murphy did not receive a response to this email.

(Tr. 34, LL. 7-8).

On May 9, 2016, having received no response from Gray, Murphy emailed Shuler and copied Gray and Marino stating:

> I never received a direct response regarding the questions below. However, a few hours after I sent my email on May 6th, Ms. Marino pointed out the attached form and instructed me to sign it. I acknowledge that I have received it and that I have read it, but I'm informing you that I will not sign that document under any circumstances.

(Tr. 34, LL. 18-22; GC Exh. 2, at 2).

On May 9, 2016, Gray responded to Murphy's May 6th email stating "all are barred from talking during the time of the investigation in any circumstance," and regarding a closed investigation, "if any one starts conversing about it and those conversations become a distraction to the workplace, anyone involved in conversing could face disciplinary action in accordance with the handbook" (Tr. 12-13; Tr. 38, LL. 13-16; GC Exh. 2, at 1). Gray also responded to Murphy's May 9 email again reiterating that "all employees are barred from talking during the time of the investigation in any circumstance" and once an investigation is closed employees could face discipline according to the handbook if "conversations become a distraction to the workplace" (Tr. 38-39; GC Exh. 2, at 2). Murphy testified that his understanding of Gray's email was that he was not allowed to discuss concerns about his working conditions with other employees (Tr. 43, LL. 13-19).

II. ANALYSIS AND DISCUSSION

In *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB No. 137 (June 26, 2015), the Board held that an employer violated the Act when it requested employees involved in a workplace investigation not to discuss the matter with their co-workers while the investigation

was ongoing. The Board reasoned in *Banner Estrella* that employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or co-workers because such conversations are "vital to employees' ability to aid one another in addressing employment terms and conditions with their employer." Id.

For the reasons discussed in its original brief to Your Honor in this case and for the reasons stated in Your Honor's decision in this matter, Counsel for the General Counsel continues to hold the position that Respondent's restriction of discussion was unlawful under *Banner Estrella*.

Although it is the General Counsel's view that Your Honor should decide this matter under the standard articulated by the panel majority in *Banner Estrella*, it is acknowledged that this standard could be viewed as unworkable and that it may fail to give appropriate weight to the shared employee and national interests furthered by the maintenance of confidentiality in the course of sensitive workplace investigations.

In so saying, it should be understood that the General Counsel remains a strong advocate for individual employee rights, particularly as those rights relate to treatment of employees by employers and labor organizations. But, individual employee rights include the right to be free of employment discrimination, harassment on the job, workplace violence, unsafe working conditions, and invasions of privacy, among other evils. And while employees' Section 7 interests are undoubtedly served by protecting the collective right to share information about wages and benefits and discipline, it elevates form over substance to ignore employees' countervailing collective interest in efficient and effective workplace investigations into matters that vitally affect their day-to-day interests on the job. Indeed, on the narrow issue of confidentiality in workplace investigations, the Board seems to stand alone in its current, single-minded adherence to the notion that its expansive and questionable vision of rights under the NLRA should trump the

countervailing federal and national interests reflected in the employment statutes administered by other agencies. The General Counsel believes and respectfully submits that it is possible to accommodate the important rights under our Act to those bestowed by federal statutes and laws of equal dignity and import, and that the collective interests of employees will be better served by doing so.

Notwithstanding these concerns and additional concerns set forth below, Counsel for the General Counsel respectfully urges the Administrative Law Judge to find Respondent's restriction on employees discussing internal investigations unlawful under *Banner Estrella.*

A. Although *Banner Estrella* Compels a Finding of a Violation Herein, Counsel for the General Counsel Acknowledges it May be Viewed as Having Failed to Weigh Important Employee Rights Protected by a Myriad of Other Statutes and Regulations.

Counsel for the General Counsel urges Your Honor to find a violation herein based on *Banner Health*. Notwithstanding this position, Counsel acknowledges it could be argued that the Board's decision in *Banner Estrella* largely ignored and, implicitly discounted, the countervailing collective employee interests that adhere in important non-NLRA statutory protections on the job, even as it concurrently gave improper weight to employees' "comparatively slight" Section 7 interests, when balanced against employers' substantial interests in ensuring the confidentiality of workplace investigations. *See Banner Estrella*, slip op. at 13-18 & 13 n.42 (citing *Great Dane Trailers*, 388 U.S. at 34). Counsel for the General Counsel deals with the latter concept in Section B of this Argument, but notes here that whether a given rule may to some degree infringe on employees' ability to discuss working conditions should not be the only consideration. For although the right of employees to discuss working conditions is admittedly important to administration of the Act, an equally important and countervailing question should be whether a collective interest may also be furthered by the efficient and effective application of other statutes and regulations that exist to provide employees with protections in the workplace. Plainly, there is a role for confidentiality of investigations, as a mechanism to further the *employee* rights and interests that derive from such statutes and regulations, which should be recognized and accommodated, in the overall collective interests of employees and the national interest.

Thus, for example, there is little doubt that, in addition to furthering the proper investigation of employment discrimination claims, confidentiality-of-investigations rules also provide protection to those individuals or groups of employees who desire to speak out on collective working conditions, but are fearful. There are obvious collective and also Section 7 interests to be served here by encouraging and effectively allowing employees to report wrongdoing in the first place, which furthers the goals of the discrimination statutes while also furthering the employees' collective interests in the workplace. *See Human Resources Best Practices Guide*, https://www.staffone.com/hr-best-practices-guide/ (last visited Jan. 23, 2019) (employee handbook can be a "vital tool in helping protect employees against inconsistent treatment and employers from discrimination or other legal claims"). For example, the EEOC advises employers to prevent workplace discrimination by adopting a strong anti-harassment policy that includes "[a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible." *See Best Practices for Employers and Human Resources/EEO Professionals: How to Prevent Race and Color Discrimination*, https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm (last visited Jan. 29, 2019).

Similarly, victims of sexual harassment are more likely to report abusive behavior if they are assured that their allegations will be investigated in a confidential manner. *See HR Magazine, How to Conduct a Workplace Investigation, Society for Human Resource Management*, https://www.shrm.org/hr-today/news/hr-magazine/Pages/1214-workplace-investigations.aspx (last visited Jan. 29, 2019) ("[e]ncourage all those involved in the investigation to keep the proceedings confidential to protect the integrity of the process. If word leaks out, other employees will lose trust and might refuse to share what they know"); Renee Manson, *Tips for Addressing and Investigating Sexual Harassment Allegations in the Workplace in Light of the #MeToo Movement*, Hiring to Firing Law Blog, Dec. 18, 2017, https://hiringtofiring.law/2017/12/18/tips-for-addressing-and-investigating-sexual-harassment-allegations-in-the-workplace-in-light-of-the-metoo-movement/ ("[f]ailure to treat a complaint with the appropriate level of confidentiality could result in employees being hesitant to report their issues and concerns in the future"). Indeed, the EEOC views a comprehensive anti-harassment policy that includes assurances that the identity of victims, alleged perpetrators, witnesses, and reporters of harassment, and the information obtained during such an investigation, will remain confidential, as helpful to prevent future

workplace harassment. *See EEOC: Promising Practices for Preventing Harassment*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/publications/promising-practices.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term (last visited Jan. 29, 2019). But, the Board's approach in *Banner Estrella* accomplishes the opposite of the collective interest: sexual harassment victims could not be assured confidentiality at the investigation's outset because an employer would first be required to analyze if there was objective evidence to require confidentiality in that case, which it could only do after it learned the content of the allegation at issue. In such circumstances, one or more victims might well decide to forego reporting altogether.

Confidential investigations also assist in maintaining workplace safety—to the benefit of all employees—including by ensuring employees that they can confidentially report accidents, issues of employee fitness and dangerous weapons in the workplace, physical hazards, or dangerous behavior such as drug abuse, without fear of retaliation. *See Human Resources Best Practices Guide*, Staff One HR, https://www.staffone.com/hr-best-practices-guide/ (last visited Jan. 29, 2019) (for a thorough workplace accident investigation, employee interviews should be conducted "separately and confidentially"); Ashley Adams-Mott, *How to Report Drug Abuse in the Workplace*, Houston Chronicle, https://work.chron.com/report-drug-abuse-workplace-19828.html (last visited Jan 29, 2019) ("[y]our identity as a reporter [of an employee's suspected drug or alcohol use in the workplace] can be kept confidential"). Thus, witnesses to illegal or dangerous behavior are more likely to report the incident and/or heed an employer's requests to cooperate if they know their identities will be kept confidential and they will not be viewed as a workplace "snitch."

Indeed, all employees have strong interests in safe workplaces ensured by employer guarantees of confidential workplace investigations. Many employees fear retaliation if they report wrongdoing in the workplace and, if they are assured confidentiality, they are more likely to report dangerous or disruptive behavior. Assuaging employees' concerns in this regard is of particular importance in the era of "#MeToo"; employers are well-advised to prepare for more reports of sexual harassment and maintain confidentiality in those investigations to support victims and encourage them to report sexual misconduct in the workplace. *See, e.g.*, Manson, *Tips for Addressing and Investigating Sexual Harassment Allegations in the Workplace in Light of the #MeToo Movement*, https://hiringtofiring.law/2017/12/18/tips-for-addressing-and-investigating-

sexual-harassment-allegations-in-the-workplace-in-light-of-the-metoo-movement/ (last visited Jan. 29, 2019) ("employers need to be ready for the impact of the MeToo movement and make sure that they have the appropriate policies and procedures in place to effectively address harassment complaints … [including by] ensur[ing] that the contents of the investigation are kept as confidential as possible"); *#MeToo: Revisiting Policies in a Trending Workplace*, Ogletree Deakins Employment Law, https://ogletree.com/insights/2017-11-21/metoo-revisiting-policies-in-a-trending-workplace/ (last visited Jan. 29, 2019) ("now more than ever, employers will find it helpful to closely examine their harassment policies…. [and] may want to acknowledge the #MeToo movement[,] … [f]oster an environment where victims feel supported[, and] … keep investigations confidential"). Encouraging employee victims and witnesses to report misconduct by assuring them confidentiality permits employers to conduct thorough investigations, which thereby protects all employees, not just the complainants, by correcting the situation, including by suspending or terminating perpetrators of harassment and abuse. As a result, all employees have much to benefit from knowing that their employers can assure them confidentiality when reporting incidents of misconduct or other workplace dangers: they will be able to enjoy a safer, more supportive, and more productive workplace. *See id.* ("[h]arassment routinely results in low employee morale, less productivity, and low retention rates"); *The Cost of Sexual Harassment in the Workplace*, ERC, Dec. 11, 2017, https://www.yourerc.com/blog/post/the-cost-of-sexual-harassment-in-the-workplace (victims suffer from low morale and psychological damage).

B. *Banner Estrella's* Requirement that Employers Determine a Need for Confidentiality on a Case-by-Case Basis in Each Workplace Investigation may be viewed as Being Impractical and Improperly Ignoring Employers' Legitimate and Substantial Need to Conduct Confidential Investigations in Order to Protect Employee Rights and Interests.

Again, although Counsel for the General Counsel continues to argue that Your Honor should find, under *Banner Health*, that Respondent violated Section 8(a)(1) of the Act as set forth above, it is acknowledged that there are certain identified weaknesses in the Board's analytical framework in that case. In *Banner Estrella*, the question before the Board concerned the legality of the employer's request that employees keep workplace investigatory interviews confidential. 362 NLRB No. 137, slip op. at 2. According to the employer, in certain "sensitive" investigations such as those involving sexual harassment, employees had been asked to refrain from discussing

the investigatory interview with coworkers, but the request did not prohibit employees from discussing their own complaints or workplace issues with co-workers even if those complaints or issues were the same ones being discussed in the investigatory interview. *Id.* at 10-12 (Member Miscimarra, dissenting in part). Despite the employer's claims that this effort at confidentiality was necessary in order to conduct a fair investigation and "separate facts from rumors," the Board majority found the employer had failed to establish a legitimate and substantial justification for requiring confidentiality because the employer had not first made an individualized determination that confidentiality was necessary in a particular interview. *Id.* at 4-5. Citing *Hyundai America Shipping Agency*, 357 NLRB 860, 875 (2011), the Board held that an *employer* must demonstrate its confidentiality needs in every case based on objectively reasonable grounds for believing that the integrity of the investigation will otherwise be compromised. 362 NLRB No. 137, slip op. at 3.

The Board's majority opinion drew sharp dissent from Member Miscimarra, who argued that the majority's test inappropriately shifted to employers the Board's responsibility to balance an employee's NLRA rights with an employer's asserted business justifications. *See Banner Estrella*, slip op. at 8 (Member Miscimarra, dissenting in part). Citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963), Member Miscimarra stated that the Board has the responsibility to determine whether actions that have the potential to interfere with NLRA-protected rights may nonetheless be justified in pursuit of legitimate business ends. *Banner Estrella*, slip op. at 13-14. Although the General Counsel agrees with former Member Miscimarra's conclusion, the dissent's analysis is too narrowly focused on the employer's business justification. Rather, even a balancing of the employees' rights and interests alone would establish that the rules in question are not unlawful, as we have discussed above.

But, rather than providing certainty regarding the types of investigations in which confidentiality would consistently be appropriate, the *Banner Estrella* majority's requirement that employers proceed case-by-case prevents responsible employers from developing internal guidelines, thereby diminishing consistency, predictability, and efficiency in investigations. The majority also ignored the reality that employers often cannot establish objectively reasonable grounds for needing confidentiality because they do not know all the facts when embarking on an investigation. *See id*. at 20. Thus, the Board's test creates a "Hobson's Choice" for employers

who must decide, at the very beginning of every workplace investigation, whether to conduct the investigation without taking reasonable steps to preserve its integrity—and thus reliability—or potentially face years of Board litigation. *See id.*; *see also* Stephen W. Lyman, *Confidential Workplace Investigations – a Dilemma for Employers*, HR Insights for Health Care, July 28, 2015, https://www.hallrender.com/2015/07/28/confidential-workplace-investigations-a-dilemma-for-employers/ ("[u]nfortunately, in [*Banner Estrella*], the NLRB offers no real guidance on exactly when the employer's 'justification' for requesting confidentiality will be sufficient to outweigh protected employee rights").

Specifically, employers must comply with federal anti-discrimination laws, OSHA, and state and local criminal statutes that have their own objectives and investigatory practices. Ensuring an investigation's confidentiality is considered the "proper" way to investigate complaints of workplace harassment; business law experts advise employers seeking to limit their legal exposure from harassment claims to "[i]nform the employee to keep the content of the interview confidential and to not discuss it among coworkers. The investigator should caution all employees being interviewed that … disclosing confidential information by discussing it with others can be cause for disciplinary action." *See* E. Jason Tremblay, *Properly Investigating Claims of Harassment: How to Limit a Company's Exposure*, American Bar Assoc. Business Law Section, Business Law Today, Vol. 18, No. 1 (Sept./Oct. 2008), https://apps.americanbar.org/buslaw/blt/2008-09-10/tremblay.shtml.[2] Employers should be permitted to err on the side of caution in their attempts to comply with these statutes and should not have to choose between complying with the NLRA and other statutory schemes.

[2] Notably, federal agencies such as the EEOC and OSHA are required to keep interviews with employees confidential during their investigations of alleged wrongdoing. *See Confidentiality*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/employees/confidentiality.cfm. (last visited Jan. 29, 2019) ("[i]nformation obtained from individuals who contact EEOC is confidential" until formal charge is filed); *What are my rights during an inspection?*, U.S. Department of Labor, Occupational Safety and Health Administration, https://www.osha.gov/workers/index.html (last visited Jan. 29, 2019) ("[w]hen the OSHA inspector arrives, workers and their representatives have the right to talk privately with the OSHA inspector … [w]here there is no union or employee representative, the OSHA inspector must talk confidentially with a reasonable number of employees").

III. CONCLUSION

For all of the reasons advanced above, Counsel for the General Counsel respectfully requests that the Administrative Law Judge continue to find, under *Banner Health*, that Respondent violated the Act by orally barring discussions about the subject of an investigation. Counsel for the General Counsel also continues to respectfully seek a cease and desist Order and further seeks all other relief as may be deemed appropriate to remedy the unfair labor practices alleged. Finally, as set forth above, Counsel for the General Counsel also requests that the allegations concerning the no-recording, the no-photography, and the no-gossip rules be severed and remanded to the Region for further disposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Motion to Sever and Opposition to the Reopening of the Record has been served this 1st day of March, 2019 on the following:

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